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SUPREME COURT OF THE UNITED STATES

No. 79-1491
October Term 1979

JOSEPH H. SEYMOUR,
C. WILLIAM BURKE,
RICHARD L. CORBIT, et al.,

Petitioners,

vs.

COUGHLIN COMPANY,
A California Corporation,

Respondent.

OPPOSITION TO PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

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To the Honorable Chief Justice and Associate Justice of The Supreme Court of The United States:

Respondent, THE COUGHLIN COMPANY, herein opposes and prays the court to deny the issuance of a writ of certiorari to review the judgment of the U.S. Court of Appeals for the Ninth Circuit entered October 5, 1979 in case no. 76-3701 of that Court.

Opinion Below

The statement of petitioners as to the opinion below by reference to Appendices A, B and C of the petitioner's brief is essentially correct.

Jurisdiction

The respondent has no objection to the petitioners' basis of jurisdiction.

Questions Presented

The petitioners raise two questions in their brief. The petition fails to present the threshold question:

1. May the appellant to the Ninth Circuit Court of Appeals raise a theory on which to base liability of the

respondent that was not presented to the District Court until after the motion for summary judgment was granted in favor of the respondent?

2. If the petitioners can raise a theory of liability based on section 8 (d) of the National Labor Relations Act, not presented to the District Court prior to its ruling on summary judgment, is a civil lawsuit the proper forum to air an unfair labor practice as a basis for liability?

3. Can a contractor signatory to a Short-form (Collective Bargaining Agreement) be bound to that agreement or the Master Labor Agreement (hereinafter referred to as "MLA"), which the Short-Form incorporates after the Union's bargaining representative and employer group have negotiated a new MLA?

Statutes Involved

Respondent contends that there are no statutes involved in the disposition of this case, but agrees that the statement of **Section 8 (d) of the National Labor Relations Act, 61 Stat. 142, 143, 29 U.S.C. 158 (d),** in the petitioners' brief is an accurate statement of that section.

Statement of the Case

The following facts come from petitioners Appendix "A" to the petitioner.

Respondent Coughlin is a California corporation which

which was incorporated in 1953, the original stockholder being D.W. Coughlin, father of the present sole stockholder, Patrick J. Coughlin.

D.W. Coughlin, President of Coughlin Company, a corporation, on August 3, 1967, executed a written Short-Form Collective Bargaining Agreement with the International Union of Operating Engineers, Local Union No. 12. No other Short-Forms or Master Labor Agreements were entered into between Coughlin Company, and International Union of Operating Engineers, Local Union No. 12. The Short-Form Agreement entered into in 1967 incorporated by reference the terms and conditions of a multiple-employer collective bargaining agreement, commonly known as the Master Labor Agreement. That Master Labor Agreement, hereinafter referred to as "MLA" was negotiated between Local 12 and a contractors-employers bargaining group.

Article V of the Short-Form Agreement is set out as follows, as the duration clause of that Short-Form:

> "This agreement shall become effective as of the date shown above and **shall continue in effect for the same term as the applicable multiple-employer labor agreements and for any renewals or extensions thereof,** unless either party shall give written notice to the other party at least sixty (60) days prior to the termination date of appropriate multiple-employer agreement, of its desire to terminate." (RA: 154). (Emphasis added).

This Article V in one paragraph covers the portion of

the agreement between the Union and Coughlin that can be referred to as the **duration** of the agreement.

On or before 60 days prior to July 1, 1969, Local 12 gave written notice to the Contractors Associations, in accordance with Article XIV of the MLA, of its desire to negotiate modifications to the terms of the MLA. Neither Local 12 nor Coughlin has given written notice to the other party of a desire to terminate or modify the short-form Collective Bargaining Agreement between them.

Thereafter, the Union and the Contractors' Association negotiated a new MLA which substantially changed, modified, and amended the prior MLA.

In 1975, the Trustees, petitioners herein, filed the current action to recover for alleged benefits obligated on behalf of the hours of Patrick J. Coughlin, the sole stockholder and operator of Coughlin for hours worked during the time period subsequent to June 30, 1969 through the end of 1974.

Coughlin denied liability to the complaint and raised eleven affirmative defenses, including a defense that the contract terminated and was cancelled in 1968. After particular pleadings in the case, the parties prepared a pre-trial conference order and agreed that each should enter cross-motions for summary judgment and have them filed in the court below. The primary argument of Coughlin in the motion for summary judgment was that the contract terminated as a matter of law under the terms of Article V of the Short-Form Agreement when the MLA incorporated in the Short-Form was terminated by the parties to

the MLA.

The Trustees had filed their own motion for summary judgment, and responded to Coughlin's motion for summary judgment. Up until the time of the hearing on the cross-motions for summary judgment both parties dealt with the issue as to whether the contract terminated by operation of law as a result of the actions of the parties to the MLA. The court ruled in favor of Coughlin that, in fact, the contract had terminated in 1969. The District Court allowed the plaintiff, petitioner herein, seven days with in which to file objections to the findings of fact and conclusions of law proposed by Coughlin. The Trustees, instead of objecting to the District Court's findings of fact and conclusions of law, raised a new theory of liability on which it felt Coughlin should be obligated under the terms of the Short-From Agreement. The new theory was based on section **8 (d) of the National Labor Relations Act, 29 U.S.C. 158 (d).** Up until that time, the plaintiff had never raised this issue in his pleadings or discussions with Coughlin, or the District Court. The District Court proceeded to grant its decision on summary judgment in favor of Coughlin based on the law presented to it in briefs and arguments.

The petitioners appealed the case to the Ninth Circuit Court of Appeals which affirmed the decision of the District Court stating that the petitioners had failed to timely raise the issue of 8 (d) in the District Court. The Ninth Circuit Court of Appeals agreed with the interpretation given the Short-Form Agreement and Article V, and thereafter affirmed the District Court's decision.

Argument in Opposition to Writ

1. THE NINTH CIRCUIT COURT OF APPEALS AND THE DISTRICT COURT PROPERLY DISREGARDED THE NEW THEORY OF LIABILITY NOT PRESENTED PRIOR TO THE MOTION FOR SUMMARY JUDGMENT.

The respondent herein agrees with the Ninth Circuit's application of **United States v. Patrin,** 535 F. 2d 708, Ninth Circuit (1978). The petitioners mistakenly imply that the case was the only basis of the decision. The Ninth Circuit Court of Appeals, at 609 F. 2d 348, states:

> "As a general rule, a Federal appellate court does not consider an issue not passed upon below." **United States v. Patrin, 575 F. 2d 708,** below." **United States v. Patrin,** 575 F. 2d 708, 712 (9th Cir. 1978) (quoting **Singleton v. Wulff,** 428 U.S. 106, 120, 96 S. Ct. 2868, 49 L. Ed 2d 826 (1976). Accord, e.g. **Roberson v. United States,** 382 F. 2d 714, 718 (9th Cir. 1967). See also **McCaffrey v. Diversified Land co.,** 564 F. 2d 1241, 1243-44 (9th Cir. 1977) (per curiam). While we have recognized a number of exceptions to this rule, none is applicable here."

The Court obviously had reference to a large body of law, including the United States Supreme Court in **Singleton v. Wulff,** 428 U.S. 106, 120, 96 S. Ct. 2868, 49 L. Ed 2nd 826 (1976) as authority that appellate court will

not consider issues raised for the first time on appeal, and not decided by the trial court below. The motions for summary judgment in a District Court were cross-motions determined after pre-trial conference. The plaintiff had full opportunity to present all arguments to the court, and must have been aware that a ruling on the motion for summary judgment in favor of the defendant would include a judgment against the plaintiff.

If the petitioners' argument were to prevail in the petition for writ herein, the result would be that the purpose of summary judgment as a time saving device would be undermined. The plaintiff could present a new argument on one theory, lose and then consume the court's and the litigant's time and labor to propose a new argument. Respondent urges the court to disallow the petitioners' attempt to have the Supreme Court review what the other courts, the District Court, and the Ninth Circuit Court of Appeals have justifiably refused to rule on.

2. EVEN IF THE COURT ALLOWED THE NEW THEORY OF RECOVERY SECTION 8 (d) OF THE NATIONAL LABOR RELATIONS ACT SHOULD NOT BE APPLIED.

In 1951 the Sixth Circuit Court of Appeals in **International Union of Operating Engineers vs. Dahlem Construction Company,** 193 F. 2d 470, stated:

"[4,5] § 158, 29 USCA § 158 does not apply to an

action for damages under § 185, 29 USC, 29 USCA § 185. The two statutes are included in totally separate divisions of the National Labor Relations Act, § 158 being found in subchapter II — National Labors Relations Act, and § 185 being include in subchapter IV, Liabilities of and Restrictions on Labor and Management. Section 158 in its original form was entitled, "Unfair labor practices by employer defined", and included five paragraphs defining unfair labor practices which are written in the present statute. New definitions of unfair labor practices were included in the amended act and approximately two-thirds of § 158, and the heading of the section is "Unfair labor practices." No provisions in § 158 relate in any way to § 185, the heading of which is "Suits by and against labor organizations — Venue, amount, and citizenship." The wording of the statutes strongly support the conclusions that even if the appellant had complied with § 158 (d), it would receive no immunity from a suit for damages for breach of contract under § 185."

The holding is quite clear that there are two separate forums. One is "remedying of unfair labor practices" pursuant to activities that are noted in the National Labor Relations Act (hereinafter NLRA), and proceed before the National Labor Relations Board (hereinafter NLRB). The Federal Courts are used only to enforce these administrative decisions. The other type of forum is that involved in the

present case. A third-party beneficiary to the Collective Bargaining Agreement seeks a money damages recovery in a civil lawsuit under Section 301 of the NLRA. As the U.S. Supreme Court stated in the case of **Local 174, Teamsters Union vs. Lucas Flower Company,** 369 U.S. 95, 101, 82 S. Ct. 571, 7 L. Ed. 593 (1962):

> "It is, of course, true that conduct which is a violation of a contractual obligation may also be conduct constituting an unfair labor practice, and what has been said is not to imply that enforcement by a court of a contract obligation affects the jurisdiction of the NLRB to remedy unfair labor practices, as such."

See, also, **General Warehousemen, etc., vs. Standard Brands** (1977), 560 F. 2d 700, 703.

A further, recent case of the Ninth Circuit Court of Appeals is especially persuasive in the disposition of this argument. On August 24, 1979, the Ninth Circuit Court of Appeals decided the case of **William C. Waggoner, et al., etc., vs. R. McGray, Inc., O'Shaughnessy Construction Company, Tri-Central Construction Company, and Vernon Houghton, Appellees,** 607 F. 2d 1229 (Ninth Circuit 1979). The holding of that case in on page 1231, as follows:

> "We hold that the NLRB's primary jurisdiction precludes federal courts from acting as the initial arbiters of unfair labor practice charges in section 301 actions."

The Ninth Circuit relied heavily on the language of the

U.S. Supreme Court in **San Diego Building and Trades Council vs. Garmen,** (1959), 359 U.S. 236, and **Sears, Roebuck & Company vs. Carpenters** (1978), 436 U.S. 180. The theory of primary jurisdiction of the NLRB to decide unfair labor practices was utilized by the court. It reasoned that when a party to a Section 301 suit for damages attempts to raise an issue of an unfair labor practice as a defense, the court should resolve the contractual issue and leave the unfair labor practice to the proper forum. The court states, at page 1236:

> "Appellee's defense that the contract involved an unfair labor practice in violation of section 8 (e) belonged before the NLRB, however, and not before the District Courts."
>
> "The appellees were the only parties who could have invoked the jurisdiction of the NLRB to hear their unfair labor practice charge. Their failure to bring the matter before the Board does not justify the District Court's assertion of jurisdiction to decide the unfair labor practice claim.

(Cf., **Sears, Roebuck & Co., vs. Carpenters, supra,** 436 U.S. at 202-03 (primary jurisdiction rationale not sufficient to preempt a court's jurisdiction when party whose claim would be preempted could not have presented unfair labor practice to NLRB.) To hold otherwise would be to encourage parties to circumvent the congressionally-established scheme for resolution for unfair labor practice disputes by the NLRB, the District Courts

should have decided the contract issues presented in the Trustees' Section 301 action without reference to the appellee's unfair labor practice defense."

It is clear that the Ninth Circuit, in conformance with and based upon the Supreme Court decisions, has ruled that in Section 301 suits the courts are competent to determine the rights and liabilities of the parties based on the collective bargaining agreement. Defenses or assertions raised on theories that a contract right should be decided as a result of whether an unfair labor practice has occurred should not be raised in such suits. If a party is aggrieved by an unfair labor practice, the party should proceed and file an unfair labor practice charge in the proper forum — the NLRB. It should be noted that the very short statute of limitations provided for in the NLRA, that is, six months, 29 USC 160 (b) would be extended by allowing a party to raise an unfair labor practice charge in a Section 301 suit. Such a result would be contrary to the obvious intent of Congress in providing the short statute of limitations.

There is little question that the plaintiffs-petitioners' rights arise out of the collective bargaining agreement signed in 1967 between Coughlin and Local Union 12. The plaintiffs-petitioners are third-party beneficiaries to that contract and certainly take it subject to any defenses that the defendant-employer would have against the Union. The issue of termination should be determined between the employer and the petitioners as if the petitioners stood in the same place as the Union. Based on law in the Ninth Circuit, and the laws stated by the United States Supreme

Court, the respondent herein urges the court to not apply the unfair labor practice charge in deciding the contractual issues of this case, just as they would deny such an opportunity to the union.

3. THE UNIONS ARE NOT PREJUDICED BY THE RULING BELOW.

The petitioners argue in their brief that by the Ninth Circuit Court of Appeals' ruling below, the Union will be prejudiced by requiring them to resign the Short-Form Contractor each time a new MLA is negotiated. Such an obligation should not be that shocking. The Union business managers thought it sufficiently important to go to the effort to first sign up the Short-Form contractor, Coughlin in this case. It doesn't seem that unusual for them to be interested enough to sign up the contractor again when the terms change as dramatically as they can in a new collective bargaining agreement. The Short-Form contractor often pays substantial benefit payments to the trust each year. It would be unbusinesslike for a contractor to complete one project for an owner and then just proceed on the next project without a new contract because of the time consuming activity needed to get a new contract signed. To place such a responsibility on the Union is not that burdensome.

The ruling of the courts below leaves intact the intent of the parties expressed in the contract. The terms and respective obligations are set out for a particular time

period. If neither party does anything — the same terms are renewed for one-year periods. Each party still knows what to expect. If the terms are altered, however, neither party knows what to expect. As the Ninth Circuit stated below, at 609 F. 2d page 350:

> "Indeed, were the agreement construed otherwise, Coughlin would, so to speak, be purchasing a 'pig in a poke'. He would be bound by the terms of any new MLA, no matter how different the terms of the modified agreement from those of the original, and although he had no part in the negotiations for that new agreement."

4. THE ACTIONS OF THE PARTIES TO THE MLA-INCORPORATED IN THE SHORT FORM BY REFERENCE-PRECLUDES THE AUTOMATIC RENEWAL PROVISIONS OF THE SHORT-FORM

The respondent herein feels that the subject presented by Question 4 goes much farther to the merits of the appeal than is requested in an opposition to a petition for writ of certiorari. However, the respondent presents below a brief argument supporting the Ninth Circuit Court of Appeals decision as found in Appendix A to the petitioners' petition.

The collective bargaining agreement which underlies the action was one presented by the Union to the employer. The language in Article V of the Agreement is set out below:

"This Agreement shall become effective as of the

date shown above and **shall continue in effect for the same term as the applicable multiple-employer labor agreements and for any renewals or extensions thereof,** unless either party shall give written notice to the other party at least sixty (60) days prior to the termination date of the appropriate multiple-employer agreement, of its desire to terminate." (Emphasis added).

The trial court and then the Ninth Circuit Court of Appeals, based on arguments presented, have held in this case that when a contract is for a particular duration (of the applicable MLA) or for any renewals or extensions thereof, then only a renewal or extension - not a modification - will allow the automatic renewal procedure to operate. The District Court and the Ninth Circuit Court of Appeals granted their decision based primarily on the case of **Eastbay Union of Machinists, Local 1304 vs. Fibreboard Paper Products Corp., 285 F. Supp. 282, aff'd. 435 F. 2d 556, Ninth Circuit 1970.** In that case, the Ninth Circuit, for the reasons stated in the trial court's decision, interpreted what renewals and extensions means in a labor relations context. The trial court and the Ninth Circuit, based upon the evidence provided by both parties, ruled that the notice given to the parties to the MLA precluded the renewal or extension of the old contract. The Ninth Circuit Court of Appeals' reasoning as shown in Appendix A to petitioners' brief is sound and stands on its own.

CONCLUSION

The petition for writ of certiorari should be denied.

Dated: April , 1980.
Respectfully submitted,

WALKER W. DOWNS of
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By:_____
Walker W. Downs
Attorneys for Respondent

PROOF OF SERVICE

State of California)
ss
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I am a citizen of the United States and a resident of the county aforesaid: I am over the age of 18 years and not a party to the within entitled action: My business address is 612 N. Bush Street, Santa Ana, California 92701.

I served the within OPPOSITION TO PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT on the interested parties in said action, by placing a true copy in each of two sealed envelopes with postage thereon fully paid, in the United States mail at Santa Ana, California to:

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I CERTIFY under penalty of perjury that the foregoing is true and correct. Executed on April 23, 1980 at Santa Ana, California.

JACK GALLAGHER